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Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 517

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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ARGUMENT.

I.

A summary judgment proceeding can never be sustained where there is a controverted question of fact and if it becomes necessary for the Court to weigh the evidence the motion for the summary judgment must be denied.

Respondent states the decision below conceded the above

to be a correct statement of the law but that there were no controverted facts regarding the forfeiture judgment.

The language of the court below, namely, "fairly weighing the evidence in the record of the posting of the notice * * *" means precisely what was said. The court obviously recognized plaintiff's point, that there was no posting of the notice. Plaintiff's position is that this should have ended the matter and the court should have held the Pike County forfeiture proceedings null and void and subject to collateral attack. However, the court took into consideration what it regarded as other evidence of the posting of the notice which plaintiff contends was incompetent and immaterial. The court below then proceeded to weigh the evidence and after "fairly weighing the evidence" reached the conclusion the notice was "duly posted at the court house door as required under the statute." Unless this decision is reversed on this point a deluge of decisions may be expected by the lower courts "weighing the evidence" in summary proceedings.

There were at least three controverted questions of fact decided by the lower court:

1. Defendant filed numerous affidavits on the question of adverse possession (see Defendant's Exhibit 9-27, Tr. 140-218). Plaintiff filed counter affidavits of J. J. Johnson (Tr. 232-241) and Nels T. Arvidson (Tr. 256-261). Every contention of defendant relative to adverse possession was controverted. None of defendant's affidavits refer to adverse possession by anyone at the time of the forfeiture proceeding which was filed in 1907, but plaintiff's and defendant's affidavits are contradictory and show genuine issues on material facts relative to possession for the

period of 15 years prior to the filing of plaintiff's suit on May 9, 1940. If adverse possession was at any time of the slightest consequence respecting the forfeiture, then adverse possession was a controverted question of fact.

2. We do not regard the posting of the publication notice as a controverted question of fact, but it was made so by the court below, and after having been made so, the court weighed the evidence and decided there had been a posting which amounted to a decision of a controverted question of fact.

3. Defendant recognized the importance of the language used by the Court of Appeals of Kentucky respecting the payment of taxes and filed in support of its summary motion two affidavits—one of John D. Thomas (Defendant's Exhibit 26, Tr. 205) and one of Gomer C. Sturgill (Defendant's Exhibit 28, Tr. 219) for the purpose of showing taxes had not been paid upon the Haskell Grant. Plaintiff filed the counter affidavits of J. J. Johnson (Tr. 232-241); Roy C. Holbrook (Tr. 242-255) and Nels T. Arvidson (Tr. 256-261), showing taxes had been paid on the Haskell Grant for at least three years of the five year statutory period. These affidavits were substantiated by records of the Auditor's office of Kentucky (See Exhibits 1 to 6, Tr. 236-241), certified copies of assessment of taxes against the Haskell Grant (see Arvidson's Exhibits 1 and 2, Tr. 254), and a photostatic copy of the original tax receipts for taxes paid on the Haskell Grant (Keel's Exhibit 1, Tr. 261).

Defendant's affidavits of Thomas and Sturgill, in our opinion, did not accomplish the purposes desired, namely, showing non-payment of taxes during the five-year statu-

tory period, but if they did then the question of payment of taxes was a controverted question of fact.

II.

Where a special state statute as to the forfeiture to the state of title in lands for non-payment of taxes prescribes the procedural steps to be taken to legally effect and record such forfeiture, the fact of literal compliance with those prerequisites must appear of record to give the court jurisdiction.

We heartily agree with the decision in the case of *Mussman* v. *Pepples,* 232 Ky. 254, 22 S. W. (2d) 605, to the effect that a collateral attack may be made where want of jurisdiction appears on the record. That is precisely what the record of the Pike County forfeiture proceeding showed in the present case—a lack of jurisdiction because the clerk *did not show by endorsement upon the original petition the time at which the copy was posted at the front door of the court house.*

True it is that the clerk entered a warning order but the entry of the warning order did not supply the requisites of the statute relating to the posting of the notice. Opposing counsel say the clerk did not state the time of the posting of the notice and did not make any endorsement, but draw the ridiculous conclusion that the "statute does not provide that it shall be signed by the clerk but only provides that the clerk shall endorse on the petition that it was posted." This is the plainest kind f double talk. The statute is plain and the clerk ompletely failed to comply with the statute. The self- erving conclusions of the warning order attorney did ot supply the jurisdictional statutory requirement. It

is the return of the designated officer in compliance with the statute which gives the court jurisdiction. If the return does not appear of record, the self-serving legal conclusions of someone else are incompetent and immaterial. The statement of opposing counsel that, "we have the endorsement of the clerk on the petition that he posted it * * *" is not a true statement.

We have yet to be shown any authority that any presumption may be indulged of the court's jurisdiction where the statute requires a record of the proof of publication to be made and no compliance with the statute appears of record.

III.

Where a special statute requires the recording of a forfeiture judgment and a sale for cash and an accounting to the owner of record, the mere rendering of the forfeiture judgment without recording and without sale and without accounting to the owner, does not divest the owner of his title and interest in said land, nor can such judgment be set up as a bar to the owner or one holding through him to assert his rights of ownership in the land.

The cases cited on page 9 of defendant's brief are cases under Section 496 of the General Statutes of the State of Kentucky and not decisions under the Forfeiture Statute. Again, opposing counsel overlook that the Forfeiture Statute was a special statute complete in itself and that the General Statutes of Kentucky had no application except where specifically made so by reference. The difference between the requirements of the Forfeiture Act respecting recording and indexing of the forfeiture judgment and Section 496 of the Kentucky Statutes relative to validity of unrecorded deeds is apparent. The for-

feiture judgment had to be indexed and recorded to give it validity while an unrecorded deed under Section 496 of the General Kentucky Statutes is valid except as against a purchaser for value without notice.

IV.

Where a special statute of forfeiture to the state of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, and that statute is repealed before all of such steps have been taken, without a saving clause in favor of pending actions, any judgment rendered under the repealed statute may not be set up as a bar to the right of the owner, or one holding title through such owner, to assert his right of ownership in the land.

The prayer for relief in the forfeiture petition was that the tracts of land be forfeited and if not purchased back "be sold in manner provided by Article III aforesaid." Obviously, the forfeiture proceeding was not prosecuted to its ultimate conclusion by the entry of the forfeiture decree. Again, counsel for defendant overlook that the forfeiture statute was a special statute requiring "a judgment of forfeiture and sale," and that the "court rendered judgment in accordance with the pleadings." (Sec. 3, Art. III).

In *Vance* v. *Rankin*, 194 Ill. 625, in which case the decisions of many States are discussed, the court said:

> "It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect it cannot be after. *South Carolina* v. *Gaillard*, 101 U. S. 433. * * * Pending judicial proceedings based upon a statute cannot

> proceed after its repeal. * * * This rule holds true until the proceedings have reached a final judgment. * * * The repeal of a statute conferring jurisdiction takes away all right to proceed thereunder unless it is expressly saved, * * * and except for the purposes of such suits as are begun, prosecuted and concluded while it is an existing law, the statute repealed is as if it never existed. * * * The effect of repealing a statute is to obliterate the prior law as completely from the records as if it had never been passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law."

Jurisdiction over pending cases is always ousted by the repeal of the statute upon which it wholly depends unless there be a saving clause, and such has been the law as stated by this court on numerous occasions.

Hollowell v. *Commons*, 239 U. S. 506, 36 S. Ct. 202, 60 L. Ed. 409 (affirming 210 Fed. 793).

Hendrix v. *U. S.*, 219 U. S. 79, 31 S. Ct. 193, 55 L. Ed. 102.

Baltimore, etc. R. Co. v. *Grant*, 98 U. S. 398, 25 L. Ed. 231.

V.

Where one section of a statute statute provides for "actual" and personal service upon non-residents whose addresses are known, and another section for "constructive" service upon non-residents whose addresses are unknown, the trial court does not obtain jurisdiction by constructive service of non-residents whose addresses are known.

We are familiar with a rule of law that strong support is found in a practice adopted and followed by the courts

for many years but we are not familiar with any rule of law which would recognize a statement of a judge, that the bar of a certain State has always construed a statute in a certain way. No weight should be given to such a statement.

VI.

The judgment of forfeiture of title limited to lands in one county of the State of Kentucky does not operate to forfeit title to all lands of the same parties defendant in all counties of the state in an action brought under the forfeiture act of the State of Kentucky.

The argument of defendant's counsel misapprehends the well established rule of law which needs no citation of authority that the exercise of jurisdiction and power of jurisdiction are two entirely different things. It may be the Pike County Circuit Court had, under the Forfeiture Act, jurisdictional power to forfeit the entire grant if a portion of it lay in Pike County. The point which we make is, that by the allegations in the forfeiture petition, this jurisdictional power was not invoked but jurisdiction was by the apt language used in the forfeiture petition limited and exercised only as to that part of the Haskell grant lying in Pike County.

VII.

The judgment of this court sustaining the constitutionality of the Kentucky forfeiture statute may not be relied upon as a basis for a factual finding that the judgment of the Pike Circuit Court forfeiting the lands embodied within the Haskell Grant to the Commonwealth of Kentucky was valid in all particulars and that plaintiff and its predecessors in title therefore had no interest in the lands covered by the grant.

The language of Mr. Justice Day quoted in our petition is so clear and precise that it leaves no room for doubt as to what was meant and intended.

VIII.

A judgment in a forfeiture proceeding under the forfeiture act of Kentucky may not be relied upon as constituting a divesting of the property right of the owner of lands with respect to which he has paid the taxes for three of the five years prescribed by the forfeiture act.

We had the right to expect that opposing counsel would discuss the language used by the Court of Appeals of Kentucky which is to the point and conclusive. Since opposing counsel have not seen fit to discuss the point made, our position has been conceded.

CONCLUSION.

What is said, commencing at the bottom of page 14 and ending on page 23 of the argument of defendant's counsel has no proper place at this stage of the proceeding. What is there said is in the nature of a confession and avoidance. The excuse for the argument made, is that the failure of the lower court to pass upon the extraneous matter now injected into this proceeding does not pre-

vent this court from affirming the judgment on any ground it sees fit. We submit this case has not reached the stage when there is anything before this court except the points made in plaintiff's application for certiorari. Defendant is on such uncertain ground that it has attempted to justify the lower court's decision with contentions not passed upon by the lower court. In effect, because of the position taken, defendant invites a review of the whole proceeding and a writ of certiorari should be allowed.

Respectfully submitted,

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